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No. 91-2024

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1991

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

—against—

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ATTORNEY GENERAL IN OPPOSITION TO THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

a. Education Law § 414 2

b. Proceedings below 4

REASONS FOR DENYING THE WRIT 6

1. The decision below is consistent with the decisions of this Court and those of other circuits .. 6

2. This case does not raise any issue under the Establishment Clause 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases PAGE

Board of Educ. of Westside Comm. Schools v. Mergens, 496 U.S. 226 (1990) 13

Concerned Women for America, Inc. v. Lafayette Co., 883 F.2d 32 (5th Cir. 1989) 8-9

Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985) 5, 6, 7, 12

Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983) 11

Grace Bible Fellowship, Inc. v. Maine School Administrative Dist. #5, 941 F.2d 45 (1st Cir. 1991) 8, 10

Greer v. Spock, 424 U.S. 828 (1976) 6

Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253, 112 L. Ed. 2d 211 (1990) 8, 10

International Soc. for Krishna Consciousness, Inc. v. Lee, ____ U.S. ____, 112 S. Ct. 2711, 60 U.S.L.W. 4749 (June 26, 1992) 6-7, 12

Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn. 1990) .. 11

Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd., 578 F.2d 1122 (5th Cir. 1978) 8, 10

Lamb's Chapel v. Center Moriches Union Free School District, 770 F. Supp. 91 (E.D.N.Y. 1991) 4-5, 12-13

Lamb's Chapel v. Center Moriches Union Free School District, 959 F.2d 381 (2d Cir. 1992) ..... 2, *passim*

PAGE

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) .. 6

May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986) 9

National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (*en banc*) 10-11

Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983) 5, 6, 7, 12

Salinas v. School Dist. of Kansas City, Mo., 751 F.2d 288 (8th Cir. 1984) 10

Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431 (3d Cir. 1985) 9-10

Trietley v. Board of Educ. of the City of Buffalo, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't 1978) 3, 13

United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) 7

Wallace v. Washoe Co. School Dist., 701 F. Supp. 187 (D. Nev. 1988) 11

Widmar v. Vincent, 454 U.S. 263 (1981) 13, 14

Administrative Decisions

Case No. 914, 31 State Dep't Rep. 447 (1924) 3-4, 8

Case No. 1815, 41 State Dep't Rep. 423 (1931) 4, 9

Decision No. 10,799, 21 Educ. Dep't Rep. 585 (1982) ... 4, 8

Decision No. 7560, 5 Educ. Dep't Rep. 54 (1965) 4, 8

Constitution and Statutes

United States Constitution, Amendment I 2, 5, 13-14

PAGE

28 U.S.C. § 2403(b) 5

Laws of 1864, c. 555, title VII, § 52 2-3

New York Education Law § 414 ..... 1, *passim*

New York Education Law § 310 3

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INTRODUCTION

New York State has chosen to make its public schools available during non-school hours for certain non-school uses, which are specified in its Education Law § 414. Within the limitations of the list of permissible uses, local school districts have discretion to consider individual applications to use their facilities. The state commissioner of education has consistently

held that uses not included in the statutory designation are improper. Although the list does not expressly exclude religious use, a New York appellate court has held that local school districts do not have discretion to permit such a use because the statute does not expressly authorize it.

The Court of Appeals for the Second Circuit held in this case that New York Education Law § 414 did not violate petitioners' First Amendment rights by failing to authorize their use of a local public school for concededly religious purposes. That determination applied settled law to the particular facts presented in this case. The Second Circuit's application of this Court's precedents was faithful to those decisions and was consistent with the way in which those precedents have been applied by other circuits to other facts. The difference in the outcome of this case from those of the selected cases in other circuits cited by the petition represents only a difference in the facts presented, and not a conflict among the circuits on the law to be applied.

STATEMENT OF THE CASE

a. Education Law § 414

Since at least 1864, New York has not made its public schools open for indiscriminate use by the general public. Rather, it has permitted such use only for particular purposes. New York Education Law § 414 (52a)[1] sets forth the non-school purposes for which New York's public schools may be used. The legislative history of that statute, and its interpretation and implementation by the state commissioner of education, demonstrate the strict limitation imposed by the statute on the discretion of local school boards in considering applications for non-school uses.

New York's public schools were first made available for after-school use in 1864. Laws of 1864, c. 555, title VII, § 52.

1 References to pages of the appendix to the petition appear herein as "__a".

That statute provided that the schools could be used for only two purposes:

> The trustees, or any of them, if not forbidden by another, may freely permit the school house, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music.

That provision is today embodied in subdivision (a) of section 414(1), which provides that public schools may be used "[f]or the purpose of instruction in any branch of education, learning or the arts".

Over the years section 414 and its predecessor statutes have been amended or re-enacted numerous times, and nine additional permissible uses of public school property have been added as subdivisions (b) through (j) of subsection 414(1). The use of school property for religious purposes has not been added to the approved uses set forth in section 414, and the New York Appellate Division has therefore held that such uses are beyond the discretion of local school districts. *Trietley v. Board of Educ. of the City of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't 1978).

In interpreting section 414, the New York education commissioner has consistently prohibited school districts from allowing their schools to be used for purposes not explicitly permitted by section 414.[2] Examples of that interpretation are found in the following decisions:

> Case No. 914, 31 State Dep't Rep. 447 (1924) (trustees could not rent school to an individual for the purpose of holding public dances or other forms of entertainment

2 The commissioner's decisions in this area are rendered on administrative appeals brought under New York Education Law § 310, which permits aggrieved parties to appeal from any "official act or decision" of school authorities concerning any "matter under this chapter, or any . . . act pertaining to common schools". It appears that no such appeal was brought to the commissioner in the present case.

for which admissions were charged which were not to be used for an educational or charitable purpose);

Case No. 1815, 41 State Dep't Rep. 423 (1931) (the use of school building by church societies and denominational organizations for entertainments and occasions where admission fees were charged and used for the benefit of the churches or the denominational organizations is not permitted by the Education Law);

Decision No. 7560, 5 Educ. Dep't Rep. 54 (1965) (school board properly refused use of school property to labor union local, as such use is not a "civic" use or other use "pertaining to the welfare of the community" within the meaning of section 414); and

Decision No. 10,799, 21 Educ. Dep't Rep. 585 (1982) (use of public school building for a private commercial venture violates section 414; the public purposes enumerated in section 414 do not include such use, and the board of education had no authority to give permission to use a school facility for any purpose other than those set forth in the statute).

None of the uses considered by those interpretations was precluded because it was religious in nature. Instead, like the use proposed in this case, they were precluded because they had not been included by the Legislature among the approved uses of public school property.

b. Proceedings below

Petitioners brought this action for declaratory and injunctive relief against respondents school district and the president of its board of education (the "school district") because of the school district's refusal to allow petitioners to use local school facilities during non-school hours for the purpose of showing a film series. *Lamb's Chapel v. Center Moriches Union Free School District*, 770 F. Supp. 91 (E.D.N.Y. 1991) (16a). Petitioners conceded that the film series was of a religious nature

and that its showing was for a religious purpose. 770 F. Supp. at 92 (18a).

On cross-motions for summary judgment, the district court found the facts to be undisputed, 770 F. Supp. at 92 (17a), and granted judgment to the local school district. The district court found that the school district had not, by its policy or practice, "opened its doors to groups akin to Lamb's Chapel", 770 F. Supp. at 99 (31a-32a), and held that the school district's denial of petitioners' applications was viewpoint-neutral and, hence, constitutional.

On appeal to the Second Circuit, petitioners asserted a challenge to the constitutionality of Education Law § 414 insofar as it failed to authorize their desired use of a public school. The New York Attorney General sought, and was granted, permission to intervene in defense of that challenge pursuant to 28 U.S.C. § 2403(b).[3] The Second Circuit affirmed the judgment. 959 F.2d 381 (2d Cir. 1992) (1a). Applying the principles established by this Court, principally in *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the Court of Appeals determined that New York had created in its public schools only a limited public forum, devoted only to the non-school uses specified in Education Law § 414. This case, the Court of Appeals wrote, "presented [an] outside organization[ ] seeking access where access has been limited and all religious use has been barred by policy and practice". 959 F.2d at 389 (15a). Accordingly, the court held that "there is no basis for any claim of First Amendment violation here" (*id.*) and affirmed in all respects.

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3 The Court of Appeals added the Attorney General to the caption of its decision as the "New York State Attorney General's Office".

REASONS FOR DENYING THE WRIT

1. The decision below is consistent with the decisions of this Court and those of other circuits.

This Court has recognized three types of fora for First Amendment purposes: the "traditional public forum", the "designated public forum", and the "non-public forum". *International Soc. for Krishna Consciousness, Inc. v. Lee*, ____ U.S. ____, 112 S. Ct. 2711, 60 U.S.L.W. 4749 (June 26, 1992); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). A subcategory of the designated public forum is the "limited public forum", which arises when a state designates public property to be used for some purposes, but not for others. A forum is thus created only for limited purposes, such as use by certain groups or discussion of certain subjects, *Perry*, 460 U.S. at 45 n.7 and 48, and is considered a public forum only as to those speakers for whose benefit the forum was created, or "entities of similar character", and not as to others. *Id.* at 48.

Petitioners characterize the forum in this case as a designated public forum and, based on that assumption, claim that the decision below misapplied the decisions of this Court and conflicts with the decisions of other circuits. Their characterization is inaccurate: the court below correctly determined that this case involves a limited forum as that term has been developed by this Court in *Perry* and other cases. *E.g., Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976) (political candidates excluded from military reservation although other members of the public permitted to speak on other subjects), and *Lehman v. City of Shaker Heights*, 418 U.S.298 (1974) (political advertising excluded from city's transit system, although other types of advertising accepted).

As the court below concluded, both the stated policy and the actual practice regulating access to the school property confirm the limited nature of the forum created. Because a public forum can be created only "by intentionally opening a non-traditional

forum for public discourse", *International Soc. for Krishna Consciousness*, 60 U.S.L.W. at 4751, quoting *Cornelius*, 473 U.S. at 802, courts look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum". *Cornelius*, 473 U.S.at 802, citing *Perry*, 460 U.S.at 47. This Court has held that evidence of that intention may be found in such factors as the statutory or regulatory scheme governing use of the property, *see Cornelius*, 473 U.S.at 805; *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 120-26 (1981); or the past policy and practice in regard to use of the property. *See Perry*, 460 U.S.-at 47; *Cornelius*, 473 U.S.at 804.

Thus, the Second Circuit appropriately looked first to the text of Education Law § 414, which on its face limits the forum to the specified uses (959 F.2d at 386-87 [10a-11a]), and then to the actual practice of the local school district, which showed that "none of the prior uses pointed to by the [petitioners] was for religious purposes". 959 F.2d 388 (13a). Consequently, the court concluded that the "facilities were limited forums not opened to religious uses by policy or practice", 959 F.2d at 388 (14a), and, therefore, that there was "no constitutional violation in the failure of the School District to afford access to [petitioners]". *Id.*

The petition contends that the decision below, denying access to New York public schools for religious speech, is in conflict with decisions of the First, Third and Fifth Circuits (Petition at 12-14). To the contrary, the decision is consistent with the legal analysis in each of the cases cited by the petition, and the results differ only because of the difference in the facts presented. In each of the cases cited by petitioners, a policy or practice established, as a matter of fact, the "indiscriminate use" that is a hallmark of the open forum available for all public uses. *Perry*, 460 U.S. at 47. In each of those cases, permission to use the government property was "granted as a matter of course to all" who sought it. *Id.* In the present case, on the other hand, there was only the "selective access" that

"does not transform government property into a public forum". *Id.*

In *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (Petition at 12), the local school board's policy was that "any group may use the [school] facilities, as long as they do not seek to propagate or propound a religious message", 941 F.2d at 46, and in fact the school district was unable to cite a single example of a refusal of access to any group other than religious organizations. *Id.* at 47. Similarly, *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253, 112 L. Ed. 2d 211 (1990) (Petition at 12), turned on a factual finding that the school district, "by its policy and practice, created a designated open forum" because it rented school facilities to a "wide range of community groups". 907 F.2d at 1369.[4] Further, the school district had permitted religious courses in its adult education program and then adopted a policy which "explicitly provided for religious discussion in several contexts", *id.* at 1372-73, while it attempted to exclude certain other religious speech because of the particular "conversion" message sought to be expressed. *Id.* at 1376.

In *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978) (Petition at 12), the school board had "historically permitt[ed], on a continuing *and indifferent* basis, the use of [school] facilities during non-school hours by private organizations". 578 F.2d at 1124 (emphasis added). Permission was granted "on a first-come, first-serve (*sic*) basis" and "no distinction between applicants" was made whatsoever. *Id.* at 1123. And in *Concerned Women for America, Inc. v. Lafayette Co.*, 883 F.2d 32 (5th Cir. 1989) (Petition at 12), the Fifth Circuit enjoined a policy of access to a public library which had excluded only "religious and political groups". 883 F.2d at 33. The head librarian had testified that, "once she determined that a group would not be meeting for a religious or political purpose, and that there was room on the calendar, she would grant the group permission to use the auditorium". *Id.*[5]

The petition also contends that the Seventh Circuit "has strongly suggested, albeit in *dicta*, that it would embrace the [rule for which petitioners argue]" (Petition at 13), citing *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1113-14 (7th Cir. 1986). But the most the Seventh Circuit suggested was that the plaintiff there would have a claim if the school authority,

> "while not obligated to allow teachers or anyone else to use school premises for meetings, in fact allowed the premises to be used for *any* meetings by teachers *except* prayer meetings."

787 F.2d at 1114 (emphasis added). Like the other holdings cited by the petition, that dictum suggests only that an otherwise-indiscriminate access policy may not single out religious use for exclusion. That conclusion is in no way inconsistent with the Second Circuit's determination that petitioners' rights were not infringed by the restricted access granted to New York's otherwise-non-public school property.[6]

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4 Among the uses allowed in *Gregoire* were meetings of labor unions and commercial profit-making ventures which charged admission. 907 F.2d at 1373. Those uses would be precluded in New York under Education Law § 414. Compare Commissioner Decision Nos. 7560, 10,799 and 914, discussed above at pages 3-4.

5 Among the non-religious purposes for which the library in *Concerned Women for America* had been used—and which would likely be barred in New York by Education Law § 414—were a closed meeting of U.S. Navy recruiters [compare § 414(1)(c), which requires that meetings "pertaining to the welfare of the community" be "open to the public"], and a United Way meeting at which discussion was held of its funding requests and budget [compare New York Education Commissioner Case No. 1815]. 883 F.2d at 34.

6 Indeed, the Seventh Circuit in *May*, 787 F.2d at 1109, cited with approval the holding of the Third Circuit in *Student Coalition for Peace v. Lower Merion School Dist.*, 776 F.2d 431 (3d Cir. 1985). There, as here, the Court of Appeals upheld a denial of access to school premises, based solely on the applicant-group's intended use of the school, because "the school had in the past also rejected requests to use the field by [other] nonschool sponsored groups". 776 F.2d at 434. In addition, as in

New York has not "selectively exclude[d]" users, on the basis of their religious speech or otherwise, as petitioners contend (Petition at 13), nor has it granted indiscriminate access to its schools. Instead, New York simply has not designated its schools as a "public forum for community events", *Student Coalition for Peace*, 776 F.2d at 437, other than for the particular purposes set forth in Education Law § 414. On the facts of this case, the Second Circuit correctly held that New York's schools are "limited forums not open to religious uses". 959 F.2d at 388 (14a). That holding is consistent with this Court's forum analysis and is not in conflict with the holding of any other circuit.[7]

The petition's second argument (Petition at 14) suffers an infirmity similar to the first and, indeed, relies primarily on the same decisions. It contends that, because public school facilities in other states have been found to be public fora, then so must New York's schools. But, again, the petition pays no heed to the different facts in each of the cases it cites, which explain the different holdings without any conflict in legal analysis.

Thus, as in *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (Petition at 15); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253, 112 L. Ed. 2d 211 (1990) (Petition at 15); and *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978) (Petition at 15), which were distinguished above at page 8, *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (*en banc*) (Petition at 15), involved a factual situation in which "*no* group ha[d] been denied the use of

the present case, the disappointed applicant "ha[d] not met its burden of showing that . . . permission was in fact granted *as a matter of course*". *Id.* at 436 (emphasis added).

7 In *Salinas v. School Dist. of Kansas City, Mo.*, 751 F.2d 288 (8th Cir. 1984), also cited by the petition (at 13), the Eighth Circuit considered a policy that "specifically states that permits will be granted to religious groups". 751 F.2d at 290. The policy decision by the Kansas City school district to open its schools to religious uses does not compel New York to adopt the same policy. *See* discussion at page 13, *infra*.

an available auditorium except the [applicant in that case]". 473 F.2d at 1013 (emphasis added). The factual record there showed the school board's "repeated exercise of its discretionary authority to rent the Yorktown High School auditorium . . . on a *first-come first-served basis*". *Id.* at 1014 (emphasis added).

Unlike each of the cases cited by the petition, the historical record in New York, and the undisputed factual record in this case, show that neither New York nor the local school district has been indifferent to the nature of applications for non-school use of public schools. Rather, the state education commissioner, the New York courts and the local school district involved in this case have all consistently limited the use of New York's public schools to the specific purposes set forth in Education Law § 414, and precluded all other applications, not just petitioners'. In short, neither petitioners nor their requested use have been singled out from an otherwise-indiscriminate use policy. *Compare* Petition at 16-17.[8]

Petitioners next argue in the alternative that, "even if the relevant forum is deemed nonpublic", the Second Circuit decision conflicts with decisions of this Court (Petition at 17). The peti-

8 The district court decisions cited by the petition (at 16), like the court of appeals decisions on which it relies, also deal with factual circumstances substantially different from those at issue here. ***Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers***, 735 F. Supp. 745, 752 (M.D. Tenn. 1990), held that a public school which was "ordinarily used for public events *of all types*" (emphasis added) could not be "discriminatorily closed" to one organization. ***Wallace v. Washoe Co. School Dist.***, 701 F. Supp. 187 (D. Nev. 1988), decided that a school district which had effectively placed no restrictions on the organizations that could use its facilities had created a public forum, but also held that the school district could nevertheless deny a church's application to convert a portion of the high school into a permanent site for church services and activities. And the school district in ***Country Hills Christian Church v. Unified School Dist. No. 512***, 560 F. Supp. 1207 (D. Kan. 1983), had established a record of allowing indiscriminate public use of its facilities, including use by some area churches, and therefore could not single out one use for exclusion. 560 F. Supp. at 1211 (Finding # 20), *as amended*, *id.* at 1221.

tion misapprehends this Court's precedents, whereas the Second Circuit followed them appropriately.

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter, so long as the distinctions are reasonable. *Perry*, 460 U.S. at 49. *See also International Soc. for Krishna Consciousness*, 60 U.S.L.W. at 4752. New York has made such a distinction here by designating the particular purposes for which its schools may be used. It has not excluded religious matters from an open forum; rather, it has created a limited forum, for specified uses only, and religious use is not among those specified.[9]

Petitioners' claim that the "exclusion" here is not viewpoint neutral (Petition at 18) is also without merit. The exclusion of a category of speech is viewpoint neutral so long as it is not intended to conceal a "bias against the viewpoint advanced by the excluded speakers". *Cornelius*, 473 U.S. at 812. In *Cornelius*, this Court found the exclusion of "all advocacy groups" to be facially viewpoint-neutral, but remanded because "the purported concern to avoid controversy excited by *particular* groups may conceal a bias against the viewpoint advanced *by the excluded speakers*". 473 U.S. at 812 (emphasis added). Significantly, the groups seeking access in *Cornelius* had "offered some evidence to cast doubt on [the] genuineness [of the purported concern]". *Id.*

Here, petitioners offered no evidence whatever that the exclusion of religious speech was designed to hide a bias against the Evangelical Christian viewpoint they espoused (2a; and see 4a-6a), as opposed to the religious viewpoints others might seek to present. The district court found (31a-32a; 45a-46a), and the Second Circuit affirmed (12a-14a), that no other groups—regardless of their particular religious viewpoints—had been permitted to use the Center Moriches schools for religious purposes. And the New York statute, on its face, permits *no* religious use, regardless of viewpoint. *Trietley v. Board of Educ. of the City of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't 1978). Plainly, these petitioners were not denied access to the public school because of their viewpoint, but because they proposed a use that did not fall into a category authorized by the statute.

9 Petitioners argue that New York's "exclusion" of religious speech from its public schools is not based on subject matter, but on the content of their film series (Petition at 18). Even if it were true that, if petitioners had sought to show a film series with "no references to a religious perspective, the series would clearly be unobjectionable" (Petition at 18)—at least so long as it met one of the criteria specified in Education Law § 414—in fact the subject matter of their film series was concededly religious (4a-6a). Therefore, it could be excluded from the forum which had been opened by statute only to certain other subject matters.

2. This case does not raise any issue under the Establishment Clause.

The final issue posed by the Petition (19-21) contends that the decision of the Second Circuit is in conflict with this Court's decisions under the Establishment Clause. There is no basis to the contention.

The Establishment Clause permits the adoption of a policy of equal access to public school property. *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). However, nothing in the petition supports an extension of those cases to hold that the Establishment Clause *requires* the adoption of such a policy. As the district court observed:

> "[T]he question to be decided by this Court, post-*Mergens*, is not whether the school district *may*, under circumstances where its policy, practice or state law otherwise provide for such access, open its forum to religious use, but whether it *must* open its forum to such use in the face of a policy, practice and in New York a state legislative enactment (§ 414 [of the] Education Law) which specifically prohibits such use. . . . This Court finds no such mandate in the *Mergens* decision."

770 F. Supp. at 96 (26a) (emphasis original; internal quotations omitted).

The petition also argues that the Establishment Clause is violated here because "an educational institution which excludes private religious speech 'would need to determine which words and activities fall within' " that category. Petition at 20, quoting *Widmar*, 454 U.S. at 272 n.11. Thus, the petition contends, the school authority "would inevitably entangle itself unconstitutionally with religious affairs by the mere enforcement of its policy of religious exclusion" (Petition at 20).

That question is not properly presented here. There was no dispute in either court below, as there is no dispute here, that the events petitioners wished to conduct were religious in nature. Indeed, petitioners' applications stated that their "paramount objective [was] to share the love of Christ" (4a); that their film series advocated "a loving home where Christian values are instilled from an early age" (5a); and that the film series presented "a Christian perspective". 959 F.2d at 383-84 (6a). Petitioners left no room for doubt that their activities were religious and, therefore, that those activities were not authorized by Education Law § 414.

CONCLUSION

The petition for a writ of certiorari should be denied. The decision of the Second Circuit carefully followed this Court's precedents and differed in its result from cases in other circuits only because the facts presented here were different. The petition does not, and cannot, demonstrate that the Second Circuit has pursued a "deviant course" (Petition 21) by holding that a State may limit the non-school purposes for which its public schools may be used.

Dated: New York, New York
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